No. 722

IN THE

Supreme Court of the United States

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JAMES D. MAHER
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LOVELL-McCONNELL MANUFACTURING COMPANY
Complainant-Appellee

vs.

AUTOMOBILE SUPPLY MANUFACTURING COMPANY, et al.
Defendant-Appellant

In Equity

Petition for Writ of Mandamus or Certiorari to the United States Circuit Court of Appeals for the Second Circuit, Etc.

GEORGE C. DEAN
IRVING M. OBRIEGHT
Counsel for Petitioner

Telephone 7020 Cort. THE WEISTHAHL PRINT 6 Church St., N. Y.

—1914—

In the
Supreme Court of the United States.

LOVELL-MCCONNELL MANUFACTURING COMPANY, *Complainant-Appellee,* *vs.* AUTOMOBILE SUPPLY MANUFACTURING COMPANY, *et al.* *Defendant-Appellant.*	In Equity.

MOTION FOR LEAVE TO FILE ANNEXED PETITON.

And now comes the above named, Lovell-McConnell Manufacturing Company, by George C. Dean, its counsel and makes application to this Honorable Court for leave to file its annexed petition praying for the writ of Mandamus or Certiorari or both writs; and further requests that an order to show cause may be granted, directed to the Circuit Court of Appeals for the Second Circuit, requiring the said Court or the judges thereof, to show cause why the writ of Mandamus should not be granted as prayed in said petition.

There is a single question of law involved, that is, whether a Clerk of a United States Circuit Court of Appeals can charge a supervision fee on an appeal from an interlocutory decree in a patent suit granting an injunction, profits and damages in view of the act of February 13, 1911 (36 Stat. at L. 901, Chap. 47 U. S. Comp. Stat. Supp., 1911, p. 275).

The United States Circuit Court of Appeals for the Sixth Circuit, and the Department of Justice have decided that such supervision fee should not be charged. The United States Circuit Court of Appeals for the Second Circuit, on the other hand, ordered such fee to be taxed in the present case, and the fee to be held by the Clerk pending the determination of this Court.

New York City, November 16th, 1914.

LOVELL-MCCONNELL MANUFACTURING CO.,
By GEORGE C. DEAN,
Of Counsel.

GEORGE C. DEAN,
IRVING M. OBRIEGHT,
Of Counsel.

In the Supreme Court of the United States.

LOVELL-McCONNELL MANUFACTURING COMPANY,

Complainant-Appellee,

vs.

AUTOMOBILE SUPPLY MANUFACTURING COMPANY,

Defendant-Appellant.

IN THE MATTER of the application of the LOVELL-McCONNELL MANUFACTURING COMPANY for a Writ of Mandamus or Certiorari, directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit and the Clerk thereof, in the cause there entitled as above.

October Term, 1914.

TO THE HONORABLE JUDGES OF THE UNITED STATES SUPREME COURT:

The petition of Lovell-McConnell Manufacturing Company, a corporation organized under the laws of the State of Delaware, respectfully shows:

I. In the case of *Lovell-McConnell Manufacturing Company v. Automobile Supply Manufacturing Company*, the United States District Court, Eastern District of New York, granted an interlocutory decree in a patent suit based on United States Letters Patent, Nos. 923,048, 923,049, and

923,122, for an injunction, damages and profits (212 Fed. 192), the order allowing the appeal having been signed by Judge Chatfield on January 29th, 1914; that the appeal record was stipulated by counsel pursuant to the act of February 13th, 1911 (36 Stat. at L., 901, Chap. 47, U. S. Comp. Stat. Supp. 1911, p. 275); that the Defendants-Appellants furnished all the necessary material to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, in printed form, except the index, of which a proposed complete draft was furnished, and all that the Clerk actually did was to revise the index and instruct the binder to print the same and collate and bind the material in proper form; that the revision of the index was made by the Clerk in pursuance of instructions from the Court to revise the index in all cases; that Defendants-Appellants paid a supervision fee of $696.00 to the Clerk of the Court of Appeals for the second circuit, said payment being made under protest, and that the only reason for Defendants-Appellants paying said fee was that the Clerk did not know whether the act of February 13th, 1911, related to interlocutory decrees, as well as to final decrees; that the Circuit Court of Appeals reversed the decision of the lower court, and ordered the bill dismissed (216 Fed., 146); and that the clerk of the Court of Appeals refused to include said supervision fee in the mandate as taxable costs against complainant-appellee, unless it could be established that such sum was properly taxable as a part of the costs to be recovered.

II. That thereafter, on the 13th day of October, 1914, a motion to re-tax the costs as to the supervision fee of the Clerk of the United States Circuit Court of Appeals for the Second Circuit

was heard and the United States Circuit Court of Appeals for the Second Circuit handed down a memorandum decision that such supervision fee should be taxed against complainant-appellee, that the clerk was ordered to retain said supervision fee of $696.00 and that the mandate was issued forthwith, but without prejudice to complainant-appellee's right to make application to the Supreme Court, notwithstanding the issuance of said mandate, for the recovery from the clerk of the amount of said supervision fee; and said complainant-appellee was subrogated to all rights which the defendants-appellants may have held against said clerk with respect to said supervision fee.

III. That the United States Circuit Court of Appeals for the Sixth Circuit in the case of *Smith v. Farbenfabriken of Elberfeld Co.*, 197 Fed., 894, 117 C. C. A., 133, has held that a similar supervision fee in a patent suit granting an interlocutory decree for an injunction, an accounting for profits and damages *should not be taxed* by the clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

IV. That the Supreme Court of the United States in *Rainey v. W. R. Grace & Co.*, 231 U. S. 703, 34 Sup. Ct. Rep., 242, in considering this act of February 13, 1911, held that the Clerk of the Federal Circuit Court of Appeals can make no charge for preparing the record for the printer, or for indexing the same, or for supervising the printing or distributing the copies, and that Defendants-Appellants in the case now before this Court paid this supervision fee after such decision.

V. That the word "*final*" in the act of February 13, 1911, modifies the word "judgment"—not "decree" so that this language fairly considers

final judgments (at law) and decrees (in equity, whether *interlocutory or final*) and does not in positive language exclude interlocutory decrees from the same, nor does it distinguish an interlocutory decree from a final decree.

VI. That the purpose of the act of February 13, 1911, is to reduce expense in those cases where the Court of Appeals and the Supreme Court might consider the same case, and it is just as important to reduce the cost of litigation in interlocutory matters as in final matters, and that the case now before this Court comes under the purview of this act, because writs of Certiorari have been issued by the United States Supreme Court to the United States Circuit Court of Appeals in cases that were *not final*, of which the following is an instance in point; the lower court in a patent suit granted a decree for an injunction and an account of profits and damages; Circuit Court of Appeals reversed lower Court; Supreme Court reversed Circuit Court of Appeals.

> *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S., 403, 22 S. Ct., 698, 46 L. ed. 968.

VII. That in the case of *John W. Yates v. Frank F. Smith Window Hardware Co.*, October term, 1913, *an interlocutory decree had been entered in a patent suit granting an injunction and a reference for profits and damages;* and was appealed to the United States Circuit Court of Appeals for the Second Circuit; that the lower Court's decision was affirmed; that an application was made for a refund of the fee paid to the clerk for supervision of the record; after an extended correspondence by counsel with the Solicitor General's Office, in which *Rainey v. Grace* and the

act of February 13, 1911, was cited, the clerk of this Court in May, 1914, was instructed by the Department of Justice to refund the supervision fee and did refund the supervision fee.

VIII. That since the time of the said instructions from the Department of Justice, the Clerk of the Court of Appeals for the Second Circuit has not charged said supervision fee on appeals from interlocutory decrees or orders until the decision of the Circuit Court of Appeals in this case; is now charging for supervision in interlocutory decree or order cases and considers the collection of said fee necessary in such cases from May, 1914, to the date of the order in this case; that it is important for the Clerk of the Circuit Court of Appeals for the Second Circuit as well as the bar of said circuit to have this matter determined, as the clerk takes in great sums of money in connection therewith.

Wherefore, and for the reason that unless this Court commands the Circuit Court of Appeals for the Second Circuit to order the clerk of its court to pay to your petitioner the supervision fee of $696.00 now held by the clerk, your petitioner will utterly be without remedy in the premises, and your petitioner respectfully prays that a writ of mandamus may be granted out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, the judges and the clerk thereof, commanding that Honorable Court to order its clerk to pay said supervision fee to your petitioner, or in the alternative that a writ of Certiorari may be granted in like manner directing the said Circuit Court of Appeals to certify to this Court the papers and proceedings relating thereto, or

that both of said writs may be granted, and your petitioner likewise prays for such other and further relief as the case may require.

Your petitioner will forever pray, etc.

Dated, New York, November 4th, 1914.

LOVELL-McCONNELL MANUFACTURING CO.,
By GEORGE C. DEAN,
Of Counsel for Petitioner.

GEORGE C. DEAN,
IRVING M. OBRIEGHT,
Of Counsel.

STATE OF NEW YORK,
County of New York, } ss.:

GEORGE C. DEAN, being duly sworn, deposes and says as follows: That he is of counsel for the petitioners herein and has had charge of this litigation from the beginning. That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

GEORGE C. DEAN.

Sworn to before me this
4th day of November, 1914.

Florence Levien,
Notary Public,
Kings County No. 24,
Certificate filed
New York County No. 38,
New York Register No. 6101.

Stipulation.

IN THE

Supreme Court of the United States

LOVELL-MCCONNELL MANUFACTURING COMPANY,

Complainant-Appellee,

vs.

AUTOMOBILE SUPPLY MANUFACTURING COMPANY, et al.,

Defendant-Appellant.

In Equity

It is hereby stipulated

1. That the facts contained in the annexed petition are true.

2. That, the Supreme Court consenting, the petition for mandamus or writ of certiorari be submitted on the 16th day of November, 1914; that if permission to file the petition for mandamus be granted or the writ of certiorari be issued, no oral argument be had; that the record filed with the petition be considered the return to the writ of certiorari, and that the questions arising on the petition for mandamus, and on said return to the certiorari be submitted under Rule 20 of the Supreme Court upon the said petition, and the said record, without further briefs than those filed on the application for the certiorari.

Dated, New York, November 9th, 1914.

(Signed) GEORGE C. DEAN,
Counsel for Petitioner.

(Signed) C. A. L. MASSIE,
Counsel for Defendant-Appellant.

(Signed) WM. PARKIN,
Clerk of the Court of Appeals
for the Second Circuit.

No. 722

DEC 14

IN THE

Supreme Court of the United States

LOVELL-McCONNELL MANUFACTURING COMPANY
Complainant-Appellee

vs.

AUTOMOBILE SUPPLY MANUFACTURING COMPANY, et al.
Defendant-Appellant

In Equity

RECORD

Telephone 1240 Cort. THE WERNER PRINT 6 Church St., N. Y.

—1914—

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Notice of Motion.

In the United States Circuit Court of Appeals.

For the Second Circuit.

LOVELL-McCONNELL MANUFACTURING COMPANY,

Complainant-Appellee,

vs.

AUTOMOBILE SUPPLY MANUFACTURING COMPANY and LOUIS RUBES, President,

Defendants-Appellants.

Gentlemen:—

PLEASE TAKE NOTICE That on Tuesday next, October 13, 1914, at the opening of Court, or so soon thereafter as counsel can be heard, in the rooms of the above-entitled Court, in the Federal Building, Borough of Manhattan, City of New York, the annexed Notion will be presented; and in support thereof, reference will be made to the annexed Scott affidavit (verified herein October 8, 1914).

Dated, New York City, October 7, 1914.

Respectfully,

(Sgd.) RALPH L. SCOTT,

Of Counsel for Defendants-Appellants.

To WILLIAM PARKIN, Esq.,

Clerk United States Circuit Court of Appeals,

Federal Building, New York City.

To GEORGE C. DEAN, Esq.,
Counsel for Complainant-Appellee,
Singer Tower, New York City.

Copy of the foregoing Notice and annexed Motion and Affidavit received this 8th day of October, 1914.

(Sgd.) WM. PARKIN,
Clerk.

Copy of the foregoing Notice and annexed Motion and Affidavit received this 8th day of October, 1914.

GEORGE C. DEAN,
Counsel for Complainant-Appellee.

Motion.

In the United States Circuit Court of Appeals. For the Second Circuit.

LOVELL-MCCONNELL MANUFACTURING COMPANY,

Complainant-Appellee,

vs.

AUTOMOBILE SUPPLY MANUFACTURING COMPANY and LOUIS RUBES, President,

Defendants-Appellants.

Now comes the above-named defendants-appellants, Automobile Supply Manufacturing Company, and Louis Rubes its President, by Ralph L. Scott, Esq., their counsel of record, and move for an Order directing the Clerk of this Honorable Court to include in the Mandate of this Court, as part of the costs to be taxed in favor of said defendants-appellants by said Mandate, the sum of six hundred and ninety-six ($696.00) dollars heretofore paid to said Clerk on behalf of said defendants-appellants as supervision fee in connection with the Transcript of Record on appeal in this cause; or, in the alternative, for an Order directing said Clerk to refund forthwith to counsel for said defendants-appellants said sum of $696.00; and for such other and further relief as may be just.

Dated, New York City, October 7, 1914.

Respectfully,

AUTOMOBILE SUPPLY MANUFACTURING CO.,
and
LOUIS RUBES, President.
By
(Sgd.) RALPH L. SCOTT,
Counsel of Record.

Affidavit of Ralph L. Scott.

In the United States Circuit Court of Appeals.

For the Second Circuit.

LOVELL-McCONNELL MANUFACTURING COMPANY,

Complainant-Appellee,

vs.

AUTOMOBILE SUPPLY MANUFACTURING COMPANY and LOUIS RUBES, President,

Defendants-Appellants.

STATE OF NEW YORK, }
County of New York. } ss.:

RALPH L. SCOTT, being first duly sworn, deposes and says: I am counsel of record for the above-named defendants-appellants, and am familiar with all proceedings heretofore had in connection with this litigation.

In this cause, it is conceded that the successful defendants-appellants aforesaid are entitled to recover the $696.00 named in the foregoing motion either from the defeated complainant-appellee (as part of the taxable costs), or from the Clerk of this Court (as a reimbursement of moneys actually paid to him under protest). The only question is whether said amount shall be paid to us by the Clerk or by the complainant-appellee.

In the lower Court an Interlocutory Decree was entered, holding the three patents in suit to be

valid and infringed, and awarding the usual injunction and accounting. Defendants appealed to this Honorable Court. After the copy of the Transcript of Record on appeal had been certified, the Clerk of this Court demanded from appellants, among other items, the sum of $696.00 as the fee for supervising the 2784 pages comprising the said Transcript, at twenty-five cents per page. This fee was promptly paid to the Clerk by appellants, but under protest.

More specifically, each party had previously printed its pleadings and proofs in the lower Court and prepared a book containing its printed exhibits. It was stipulated (Record, p. 2152) that the Transcript of Record on appeal should comprise these copies of pleadings and proofs and exhibits printed for use in the lower Court, plus the Opinion, Interlocutory Decree, and Appeal-papers, —and it was so ordered by the District Judge. Subsequently, the Presiding Judge of this Honorable Court granted an Order setting forth that—

> "The evidence adduced in the lower Court by the respective parties hereto need not be stated in narrative form, as required by Equity Rule 75, but that the said evidence may be set forth in the transcript of record on appeal in the same form as printed for use in the Court below."

Appellants supplied the Clerk of this Court with the required number of printed copies of complainant's Record and Exhibits (and paid complainant-appelle $1000 for the same); and appellants likewise supplied to said Clerk the required number of printed copies of their own Record and Exhibits; in addition, there was supplied to the Clerk the required number of printed copies of the Opinion below and of the Appeal-papers. All

of the necessary material was furnished to the clerk in printed form, except the index, of which a proposed complete draft was furnished. Therefore, as deponent understands, all that the Clerk actually did was to instruct the binder to print the index and collate and bind the material in proper form. The binder was paid for his services by the appellants, through the Clerk; and the amount so paid ($170.08) the Clerk properly considers a taxable disbursement, as of old, and this sum will be included in the costs taxed by the mandate.

On or about June 8, 1914, this Honorable Court handed down its written Opinion on said appeal, directing the entry of "a decree dismissing the bill with costs to the defendants-appellants". Within ten days thereafter appellants filed with the Clerk their proposed bill of costs with proof of service of the same upon opposing counsel (all in conformity with paragraph 2 of this Court's Rule 36), and appellants included said sum of $696.00 in said proposed bill of costs.

This Honorable Court having heretofore directed that its mandate in this cause be withheld to give complainant-appellee opportunity to present its Petition for Rehearing, and said Petition having been now (October 7, 1914) denied, it has now become the duty of the Clerk of this Court to prepare a mandate herein addressed to said District Court for the Eastern District of New York; and paragraph 5 of this Court's Rule 31 sets forth that "when costs are allowed in this Court, it shall be the duty of the Clerk to insert the amount thereof in the body of the mandate, * * * and annex to the same the bill of items taxed in detail."

Prior to the decision of the United States

Supreme Court on January 5, 1914, in *Rainey v. Grace* (231 U. S., 703), said supervision fee was invariably considered a taxable disbursement, and was included in the mandate in cases where costs were awarded to an appellant.

Deponent has been informed by the Clerk that, in view of the decision in *Rainey v. Grace*, he (the Clerk) is in doubt whether said supervision fee of $696.00 is now to be considered as an item to be taxed in favor of the appellants herein, and that said $696.00 will *not* be included in the mandate of this Court unless it can be established that such sum is properly taxable as a part of the costs to be recovered.

Deponent has also been informed by the Clerk that, in view of said decision in *Rainey v. Grace*, he (the Clerk) is now in doubt whether said supervision fee of $696.00 should have been charged to and collected from appellants in the first instance; but that such charge and collection were necessary (for his own protection) because of the fact that it had not been determined whether the law set forth in *Rainey v. Grace* applied to appeals from *interlocutory* decrees as well as *final* decrees, or solely to the latter.

As the situation now exists, the Clerk will not include the said $696.00 in the costs taxed by the Mandate, on the theory that said sum may not have been a *necessary* disbursement and therefore not recoverable from complainant-appellee as costs; neither will the Clerk refund the amount to appellants, on the theory that he would then become personally liable in case it be hereafter established that the doctrine of *Rainey v. Grace* does not apply to an appeal from an *interlocutory* decree.

Appellants were obliged to pay the $696.00 in order that their case might be docketed and

brought before this Court for determination; under this Court's decision, appellants are entitled to reimbursement;—these propositions are *not* questioned by the Clerk. But whether appellants shall be reimbursed by the appellee or by the Clerk is the question now presented to this Honorable Court for determination.

(Sgd.) RALPH L. SCOTT.

Subscribed and sworn to before me
this 7th day of October, 1914.

(Sgd.) Julius Walerstein,
Notary Public,
New York County.
(Seal.)

Memorandum Decision.

United States Circuit Court of Appeals.
For the Second Circuit.

LOVELL-McCONNELL MANUFACTURING COMPANY, *Complainant-Appellee,* *against* AUTOMOBILE SUPPLY MANUFACTURING COMPANY and LOUIS RUBES, *Defendants-Appellants.*	No. 292 October Term 1913.

The clerk is instructed not to return the supervision fees but to tax them against the appellee. The motion to re-tax is denied.

October 13, 1914.

Order.

In the

United States Circuit Court of Appeals.
For the Second Circuit.

Present:

HON. E. HENRY LACOMBE,
HON. HENRY G. WARD,
HON. HENRY WADE ROGERS,
United States Circuit Judges.

LOVELL-McCONNELL MANUFACTURING COMPANY,

Complainant-Appellee,

vs.

AUTOMOBILE SUPPLY MANUFACTURING COMPANY, and LOUIS RUBES, President,

Defendants-Appellants.

No. 292.
October Term
1913.

This cause coming on to be heard on appellants' motion for an order directing the clerk to include the supervision fee of $696.00 as a part of the costs to be taxed by the mandate, or, in the alternative, to refund the amount of said fee to the appellants, and further on appellee's motion to retax certain items allowed by the clerk; and counsel for each party having been heard both orally and by written briefs; and the Court being fully advised in the premises, and having handed down its memorandum opinion herein on October 13, 1914; now, in conformity with said opinion,

and on motion of Ralph L. Scott, Esq., of counsel for appellants, it is this day

ORDERED that the clerk retain the said supervision fee of $696.00, and include in the mandate the said sum of $696.00 as a part of the costs to be recovered by the appellants from the appellee; and it is further

ORDERED that the appellee's motion to retax be and the same hereby is in all respects denied; and it is further

ORDERED that the mandate herein be issued forthwith, but without prejudice to complainant-appellee's right to make application to the Supreme Court, notwithstanding the issuance of said mandate, for the recovery from the clerk of the amount of said supervision fee; and said complainant-appellee is hereby subrogated to all rights which the defendants-appellants may have held against said clerk with respect to said supervision fee.

Dated, New York City, October 15, 1914.

E. HENRY LACOMBE,
United States Circuit Judge.

Approved as to form.

Of counsel for Complainant-Appellee.

Clerk's Certificate.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 11 inclusive contain true and complete copies of the originals thereof in the case *Lovell-McConnell Manufacturing Company, Complainant-Appellee against Automobile Supply Manufacturing Company, et al., Defendant-Appellant*, as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this ninth day of November, in the year of our Lord One Thousand Nine Hundred and Fourteen and of the Independence of the said United States the One Hundred and Thirty-ninth.

WILLIAM PARKIN,
Clerk.

(Seal of Court.)

No. 722

Office Supreme Court U.S.
FILED
DEC 14 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

In the Matter of the Petition of Lovell-McConnell Manufacturing Company, entitled in

LOVELL-McCONNELL MANUFACTURING COMPANY,
Complainant-Appellee,
vs.
AUTOMOBILE SUPPLY MANUFACTURING COMPANY ET AL.,
Defendants-Appellants.

October Term, 1914.

BRIEF IN OPPOSITION TO PETITION.

C. A. L. MASSIE,
RALPH LANE SCOTT,
Of Counsel for Automobile Supply Mfg. Co. et al. and, by request, for the Judges of the United States Circuit Court of Appeals for the Second Circuit,
WOOLWORTH BUILDING,
New York City.

Copy of within brief received this 13th day of November, 1914.

WM. PARKIN,
Clerk U. S. C. C. A., 2nd Cir.

GEORGE C. DEAN,
IRVING M. OBRIEGHT,
Counsel for Petitioner.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

IN THE

SUPREME COURT OF THE UNITED STATES.

In the Matter of the Petition of LOVELL-MCCONNELL MANUFACTURING COMPANY, entitled in LOVELL-MCCONNELL MANUFACTURING COMPANY, Complainant-Appellee, vs. AUTOMOBILE SUPPLY MANUFACTURING COMPANY and LOUIS RUBES, President, Defendants-Appellants.	October Term, 1914.

BRIEF IN OPPOSITION TO PETITION.

The Petition herein relates to a matter of "costs" in the United States Circuit Court of Appeals for the Second Circuit. The object of the Petition is to obtain a review by this Court of a decision by the Court of Appeals, in which the Clerk was directed to retain and tax as part of the appellants' costs the usual "supervision fee," provided by the Fee Bill, for supervising the printing of the Transcript of Record on appeal.

The Automobile Supply Mfg. Co. and Louis Rubes, its president, referred to in the Record and caption as "defendants-appellants," have no interest whatever in this particular matter. The immediate controversy is exclusively between the petitioner and the Clerk of the Court of Appeals.

The decision to be rendered upon this Petition, however, will seriously affect the revenues of the Government, as well as all litigants who resort to the several Federal Courts of Appeals.

All parties earnestly hope that the Supreme Court will now take the question under advisement, and will render an opinion not only covering this particular case but also laying down some general rule for the guidance of the Clerks and litigants in all appeal cases. As matters now stand, the Clerk of every Federal Court of Appeals must decide in the first instance, and at his peril, whether each particular order or decree brought up for review is " interlocutory " or " final,"—with the possibility of a claim being subsequently made against him (at any time within the Statute of Limitations), either by the Government or by the party appellant, if the Clerk's decision should be deemed wrong.

For the purpose of expediting a decision on this important question, the parties have signed the Stipulation, submitted herewith, that the case be submitted without oral argument under Rule 20 of this Court, and that the Petition, with the accompanying " Record " and this Brief, be considered such submission.

Argument.

The Petition involves consideration of Section 1 of the Act of February 13, 1911 (36 Stat. at L., 901, Chap. 47); and the Petitioner's entire contention is based wholly upon a strained and unwarranted interpretation forced upon the plain language of that Act.

The Act deals with a review by a Court of Appeals (upon either " writ of error " or " appeal ", as the case may be) of " the *final* judgment or decree ". The present controversy arises upon an appeal from an " interlocutory " decree, therefore the Act does not here apply.

In the wording of the Act,—" *the* final judgment or decree ",—the use of the definite article " the " is noteworthy; it is only the *final* decree which could properly be spoken of as " the " decree in an equity suit. The quoted expression means the same as " the final judgment or *the final* decree ". Petitioner's whole contention is based upon the erroneous as-

sumption, in paragraph V of the Petition, that the quoted expression means " the final judgment or *any* decree, whether interlocutory or final ".

Manifestly the adjective " final " (as does the definite article) qualifies *both* nouns,—" the final judgment ", " the final decree ". Grammatically, the expression is analogous to the expression " an interlocutory order or decree " in the Evarts Act (and in the numerous amendments thereto), and also in Section 129 of the present Judicial Code, where the adjective " interlocutory " and the indefinite article " an " modify both nouns,—" an interlocutory order ", " an interlocutory decree ".

Had our law makers intended this Act of February 13, 1911, to have the meaning now asserted by the Petitioner, they would have omitted the word " final," or would have employed some such expression as " *the* final judgment or *any* decree,"—or " *a* decree or *the* final judgment,"—or some other phraseology to show plainly that although the Act is to apply to reviews of no " judgments " except such as are *final*, yet in case of " decrees " its application is to be unlimited—*every* decree, whether " interlocutory " or " final."

As a matter of fact, no " judgments " except *final* judgments come to the Courts of Appeals for review ; but those Courts have jurisdiction to review *interlocutory* orders or " decrees " relating to injunctions or appointing receivers, and also to review (by petition to revise) orders in bankruptcy, which orders may be either interlocutory or final. Hence, if the word " final " in the Act modifies only the word " judgment ", then it is superfluous ; and, in order to have any force, the word " final " must likewise modify the companion word " decree ", and the Act must read as if it literally said " the final decree ".

Our Contentions.

(1) Prior to this Act of February 13, 1911, the Fee Bill imposed the so-called supervision-fee of twenty-five cents for each page of the transcript on *every* appeal—whether from an interlocutory decree or from a final decree ;

(2) The Act deals exclusively with an appeal from " the *final* " decree ; and being *to that extent* inconsistent with the

Fee Bill, the requirement of the Fee Bill relating to an appeal from the final decree is repealed by implication ;

(3) But, inasmuch as the Act does *not* deal with appeals from " interlocutory " decrees, there is *no* implication of repeal of the requirement of the Fee Bill governing appeals from " interlocutory " decrees, and that requirement remains in force.

It should be noted here that *if* the implication of the Act does not repeal the provisions of the Fee Bill governing appeals from " interlocutory " decrees, then the Clerk was entitled to charge (in fact, it was his *duty* to charge) the full amount actually received, $696.00—which is an " indivisible fee " (*Bean vs. Patterson*, 110 U. S., 401 ; 28 Law Ed., 190). There is no dispute concerning the *amount* of the fee.

Judicial Considerations of the Act.

So far as we are aware, this Act has been considered judicially in only four reported decisions.

First, by the Court of Appeals for the Second Circuit in two cases (186 Fed., 625). These were appeals from *final* decrees, although the opinion does not expressly so state, and it was the complainants who took the appeals. The complainants-appellants, having apparently complied with all the terms of the Act, moved to be relieved from payment of the Clerk's supervision fee. The Court of Appeals, finding that the Clerk had done *some* work in relation to the appeal (preparation of the index, &c.), and noting that this Court in *Bean vs. Patterson*, 110 U. S., 401), had held the fee to be " indivisible," said it would be unsafe for the Clerk to collect merely the fee per page of *index*, because no regulation of the Court could relieve him from the statutory obligation to account to the Treasury Department for the full amount. Yet, in view of the plain intent of Congress to reduce fees, the Court of Appeals directed the Clerk to receive the full amount of the fees and hold the same as a special deposit until the " proper authority " should have distributed

the "indivisible fee" prescribed by the Supreme Court Fee Bill. The Court suggested the desirability of further legislative action, which, however, has not yet been taken.

Colt's Patent Fire Arms vs. New York Sporting Goods, 186 Fed., 625; 108 C. C. A., 489;
Victor vs. Hoschke, *Id.*

However, subsequent to that decision, the Department directed the Clerk to account for and pay into the Treasury the full amount of the supervision fees; and the Court of Appeals modified its order accordingly, and the Clerk complied.

Second, by the Court of Appeals for the Sixth Circuit (197 Fed., 894). In that case the defendant appealed from an *interlocutory* order granting a preliminary injunction. The Court of Appeals, in a "*Per Curiam*," said:

> "We are unable to see how such an order can be brought within the definition of the statute, by any permissible liberality of construction. Such an order is not final, from any point of view or for any purpose."

In the course of its opinion, however, the Court referred to an earlier (unreported) decision it had rendered in an appeal by a defendant below from the usual decree in a patent case, awarding an injunction and an accounting, saying:

> "It is well settled that, as a matter of strict definition, such a decree is not final, but is interlocutory."

Notwithstanding that fact, the Court said it had given the language of the Act a liberal construction, and had concluded that such a decree was within the contemplation of the Act.

Smith vs. Farbenfabriken, 197 Fed., 894.

We submit, however, that this Court has definitely settled that such decree—one awarding an injunction and an accounting in a patent suit—is an "interlocutory" decree and *not* a final one. *Ex parte National Enameling, &c., Co.*, 201 U. S., 156; 50 Law Ed., 707.

Third, by this Court in *Rainey vs. Grace* (231 U. S., 703). That case arose from an appeal to the Court of Appeals for

the Ninth Circuit, in an admiralty case. That is to say, an appeal from the *final* decree; since appeals lie only from final decrees (Judicial Code, Section 128) or from interlocutory orders or decrees relating to "injunctions" or "receivers" (Judicial Code, Section 129); moreover, in admiralty, appeals lie only from *final* decrees (1 Cyc., 898, and cases there cited). This Court, in reaching its conclusions regarding the effect of the Act upon the Fee Bill, noted that the Act contains no express repeal of the earlier law; pointed out that "repeals by implication are not favored," and that "only in cases of *clear* inconsistency" will a later Act be held to repeal a former one. And, having before it an appeal from a *final* decree, this Court was careful to limit its decision to holding merely that the Act repealed the Fee Bill "in the case mentioned under the facts certified,"—that is to say, in the case of an appeal from a *final* decree.

The Act of February 13, 1911, must be regarded not as *creating de novo* entirely new rights, but as modifying or changing (or by implication, repealing) certain already subsisting requirements created by the Fee Bill promulgated by this Court under the authority of a prior Statute. Had there been no subsisting requirement for a supervision fee—no requirement already in existence when the Act became law—then there might be room for Petitioner's contention. But, inasmuch as the Fee Bill was then in full force, having all the force of a Statute, and imposed a supervision fee upon *every* appeal (from an "interlocutory" decree as well as from a "final" decree), it is clear that the Act cannot be regarded as *repealing* the already-subsisting requirement for a supervision fee upon appeals from an "interlocutory" decree, unless it contains unambiguous language showing clearly, either by explicit words or by inevitable implication, the intention of Congress to do so. And, in the absence of such language in the Act, the Court cannot amend the Act by *adding* to it what is not found therein.

> "When a provision is left out of a statute, either by design or mistake of the legislature, the courts have

no power to supply it. To do so would be to legislate and not to construe."

Hobbs vs. McLean, 117 U. S., 567, 579;
29 Law Ed., 940, 945, and cases there cited.

Fourth: Subsequent to *Rainey vs. Grace, supra*, the Act came again before the Court of Appeals for the Second Circuit, in two bankruptcy cases (215 Fed., 898), where review was sought of certain decisions below, which the Court of Appeals held to constitute "final" decrees. Consequently, the Act was held to apply, and the Clerk was directed to return the supervision fees to the parties who had paid them in.

In Re Burr Mfg. Co., 215 Fed., 898;
In Re Leavitt & Grant, *Id.*

As appears by the Petition, the Department or Justice has taken the view that the Act abolished the supervision fee in *all* cases. But, in *Rainey v. Grace, supra* (231 U. S., 703), this Court held merely that by this Act the supervision fee was abolished when the appeal was from a final decree (in Admiralty). In view of the guarded language used in the final paragraph of that Opinion, and the many expressions of this Court that its opinions must be read in connection with the facts of the respective cases in which they are rendered, we do not understand that the Supreme Court intended to decide that the supervision fee was abolished in *other* cases presenting *different* facts.

The "Argument of Convenience."

Petitioner urges that it is plainly the intention of Congress that the fees should be reduced; that the same reasoning which led to the conceded reduction of the fees on appeals from final judgments and final decrees, justifies a similar reduction on appeals from interlocutory decrees; that the Court of Appeals for the Ninth Circuit (in the earlier decision referred to in *Smith vs. Farbenfabriken*, 197 Fed., *supra*), was correct in giving its liberal construction to the terms of the Act; and that it would be a great hardship and inconvenience to litigants to require them to pay the supervision fee on

appeals taken from the usual "interlocutory" decree in patent cases, while relieving them of such fees when appealing from "the final" decree.

The reply to this "argument of convenience" is that we have to accept the Act as we find it; that its terms are plain and unambiguous; and that to construe the expression "the final judgment or decree" as meaning "the final judgment or *every* decree (whether interlocutory or final)," and to construe the expression 'the *final* decree' as applying to an "interlocutory" decree—would be not to *construe* the law but to *amend* it.

Hobbs vs. McLean, 117 U. S., 567, 579-80; 29 Law. Ed., 940, 945, and cases there cited;
36 Cyc., "Intention of Legislature," 1106-1113, and cases there cited.

Conclusion.

The requirement of the Fee Bill concerning appeals from interlocutory decrees remains unaffected by the Act of February 13, 1911, and is still controlling of the case at bar.

In granting the order of October 15, 1914 (pages 10-11, of the "Record" herein), the Court of Appeals was acting in strict conformity with the existing law, and properly directed the Clerk to retain the supervision fee and to tax it against the defeated appellee.

The correctness of that order is so manifest that this Court will forthwith either *approve* said order, or *refuse to interfere* with it.

In either event, the prayer of the Petition should be *denied*.

New York, November 13, 1914.

Respectfully submitted,

C. A. L. Massie,

Ralph Lane Scott,

Of Counsel for Automobile Supply Mfg. Co., *et al.*, and, by request, for the Judges of the United States Circuit Court of Appeals for the Second Circuit.

LOVELL-McCONNELL MANUFACTURING COMPANY *v.* AUTOMOBILE SUPPLY MANUFACTURING COMPANY.

APPLICATION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 722. Motion for leave to file petition for writ of mandamus or certiorari, submitted November 16, 1914.—Decided December 14, 1914.

In this case a petition for mandamus directing the court below to correct its action is denied and a petition for certiorari granted, and the parties having so stipulated, the papers filed are treated as the record, and the case regarded as submitted for decision on the merits.

Although the provisions in the Act of February 13, 1911, c. 47, 36 Stat. 901, in regard to clerk's fee for supervising printing the record, may not apply to appeals from every interlocutory decree, it does apply where the decree, as in this case, although interlocutory in character, is, within the intendment of the statute, a final decree. *Smith* v. *Farbenfabriken of Elberfeld Co.*, 197 Fed. Rep. 894, approved.

THE facts, which involve the construction of the act of February 13, 1911, 36 Stat. 901, amending the fee bill and its application to interlocutory decrees, are stated in the opinion.

Mr. Irving M. Obrieght and *Mr. George C. Dean*, for Lovell-McConnell Co., in support of the motion.

Mr. C. A. L. Massie and *Mr. Ralph Lane Scott*, for Automobile Supply Co., in opposition to the motion:

The act of February 13, 1911, deals with a review by a Court of Appeals upon either "writ of error" or "appeal," as the case may be of "the final judgment or decree." The present controversy arises upon an appeal from an "interlocutory" decree, therefore the act does not here apply.

Prior to this act the fee bill imposed the so-called supervision fee of twenty-five cents for each page of the transcript on every appeal—whether from an interlocutory decree or from a final decree. The act deals exclusively with an appeal from "the final" decree; and being to that extent inconsistent with the fee bill, the requirement of the fee bill relating to an appeal from the final decree is repealed by implication.

Inasmuch as the act does not deal with appeals from interlocutory decrees, there is no implication of repeal of the requirement of the fee bill governing appeals from interlocutory decrees; that requirement remains in force.

If the implication of the act does not repeal the provisions of the fee bill governing appeals from "interlocutory" decrees, then the clerk was entitled to charge (in fact, it was his duty to charge) the full amount actually received, as an "indivisible fee." *Bean* v. *Patterson*, 110 U. S. 401.

This act has been considered judicially in only four reported decisions in the first of which the court suggested the desirability of further legislative action, which, however, has not yet been taken. See *Colt's Patent Fire Arms* v. *N. Y. Sporting Goods*, 186 Fed. Rep. 625; *Victor* v. *Hoschke*, *id.*; *Smith* v. *Farbenfabriken*, 197 Fed. Rep. 894.

This court has definitely settled that such decree—one awarding an injunction and an accounting in a patent suit—is an "interlocutory" decree and not a final one. *Ex parte National Enameling &c. Co.*, 201 U. S. 156.

In *Rainey* v. *Grace*, 231 U. S. 703, this court, in reaching its conclusions regarding the effect of the act upon the fee bill, noted that the act contains no express repeal of the earlier law; pointed out that repeals by implication are not favored, and that only in cases of clear inconsistency will a later act be held to repeal a former one. And, having before it an appeal from a final decree, this

court was careful to limit its decision to holding merely that the act repealed the fee bill in the case mentioned under the facts certified.

The act of February 13, 1911, must be regarded not as creating *de novo* entirely new rights, but as modifying or changing, or, by implication, repealing, certain already subsisting requirements created by the fee bill promulgated by this court under the authority of a prior statute.

When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe. *Hobbs* v. *McLean*, 117 U. S. 567, 579.

In two bankruptcy cases where review was sought of certain decisions below, which the Court of Appeals held to constitute "final" decrees, the act was held to apply, and the clerk was directed to return the supervision fees to the parties who had paid them in. *In re Burr Mfg. Co.*, 215 Fed. Rep. 898; *In re Leavitt & Grant*, *id.*

The department of justice has taken the view that the act abolished the supervision fee in all cases. But, in *Rainey* v. *Grace*, 231 U. S. 703, this court held merely that by this act the supervision fee was abolished when the appeal was from a final decree in admiralty. It does not appear that this court intended to decide that the supervision fee was abolished in other cases presenting different facts.

The reply to petitioner's argument of convenience and that Congress intended to reduce the fees is that we have to accept the act as we find it; that its terms are plain and unambiguous; and that to construe the expression "the final judgment or decree" as meaning "the final judgment or every decree (whether interlocutory or final)," and to construe the expression "the final decree" as applying to an "interlocutory" decree—would be not to construe the law but to amend it. *Hobbs* v. *McLean*, 117 U. S. 567, 579; 36 Cyc. 1106–1113.

The requirement of the fee bill concerning appeals from interlocutory decrees remains unaffected by the act of February 13, 1911, and is still controlling of the case at bar.

In granting the order under review, the Court of Appeals was acting in strict conformity with the existing law, and properly directed the clerk to retain the supervision fee and to tax it against the defeated appellee.

The correctness of that order is so manifest that this court will forthwith either approve said order, or refuse to interfere with it.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The application is for leave to file a petition for mandamus directing the court below to correct the action taken by it which is complained of or for the allowance of a certiorari to bring up the record in order that such complained of action may be reviewed. We decline to allow leave to file the petition for mandamus, but grant the petition for certiorari and conformably to the stipulation of the parties treat the document made a part of this proceeding as the record for the purpose of the certiorari and proceed to act upon the same treating the case as under submission on the merits.

The Automobile Supply Company appealed to the court below from an interlocutory decree in favor of the complainant, the Lovell-McConnell Company, finding that the patents sued on had been infringed and awarding an injunction and directing an accounting for damages and profits. On such appeal the Automobile Supply Company furnished the clerk of the court below a complete printed record accompanied with a written index of the contents of the same and in consequence of a demand made by the clerk deposited under protest the sum of $696.00 as a fee

due the clerk for supervising the printed record so furnished. When after a hearing the court reversed the decree of the trial court, the Automobile Supply Company called upon the clerk either to refund the money charged for supervision or to include it in his statement of the costs to be entered on the mandate. The clerk, being doubtful as to his duty in the matter, refused to do either and insisted that the propriety of the charge be tested to the end that he might act advisedly in the premises. The Automobile Supply Company thereupon moved to direct the clerk to include the supervision fee in the mandate or to refund the amount of the deposit which had been made. The court held that the charge for supervision was lawful and was therefore properly taxable as costs and directed the clerk to retain the money and include a charge for the same in the mandate. The application before us was then made by the Lovell-McConnell Company, the party cast and ultimately bound for the costs, both the parties, however, entering into the agreement as to the record and the submission on the merits which we at the outset stated.

Considering the act of Congress of February 13, 1911, c. 47, 36 Stat. 901, U. S. Comp. Stat. Supp. 1911, p. 275, in *Rainey* v. *W. R. Grace Co.*, 231 U. S. 703, it was held that the provisions of the act were applicable to the Circuit Courts of Appeals and it was consequently decided that where a printed transcript of the record was filed in compliance with the statute with the clerk of the Court of Appeals no supervision fee could be charged by such clerk. Of course, if that ruling is here applicable, the court below clearly erred in allowing the charge for supervision, and the only possible question therefore is whether the statute, although generally applicable to records filed in the Circuit Court of Appeals, is not so applicable in this case. It is insisted that it is not—and the court below so held—because as the statute only provides for an appeal from a "final judgment or decree," it does not apply to

a case like the one under consideration where the appeal was from a decree interlocutory in character. But without affixing to the statute a latitudinarian meaning upon the theory that to do so is essential to give effect to its purpose and intent and bring every interlocutory decree within its reach, we are of opinion that to exclude an interlocutory decree of the character of the one here involved from the operation of the statute would be to frustrate its plain purpose by a too rigid and unreasoning adherence to its letter. We so conclude because, while in a technical sense the decree here in question was interlocutory, when its character and the scope of the subject-matter which the appeal brought under review and the relief under it which it was competent to afford are considered, we are of opinion it must follow that such decree was within the intendment of this statute a final decree and therefore that error was committed in permitting the supervision charge. Indeed, this view was taken in a well considered opinion by the Circuit Court of Appeals for the Sixth Circuit in a case decided before the ruling in the *Rainey Case*, *supra* (*Smith* v. *Farbenfabriken of Elberfeld Co.*, 197 Fed. Rep. 894), and we approve the reasoning by which the ruling in that case was sustained.

It results that the Circuit Court of Appeals erred in its order approving the charging and retaining the fee for supervision and such order is therefore reversed with directions to the court below to take such steps as may be necessary by recalling the mandate, if needs be, or otherwise, to afford the relief essential to give effect to the conclusions which we have expressed.

Reversed.